

scrutiny. In the Court's view, its decision "does not imperil every law regulating firearms," and quoting *Heller*, it perceives no threat to "such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'" Total handgun bans will probably fall — and their effectiveness is uncertain in any event — but otherwise the impact of this sea change in constitutional law may be modest. Still, it will be years, even decades, before that conclusion is clear. And the possibility of more guns in homes, especially handguns, is troubling, as is the lack of guidance the Court's opinion offered to lower courts. For their part, physicians should remain vigilant and address gun issues, such as access and storage, with patients, especially those who may be suicidal, have survived domestic violence, or live with children. We can only hope

that in hindsight, bleak post-*Heller*, post-*McDonald* forecasts will seem hyperbolic.

Otis McDonald has not won yet. A lower court will now decide whether the laws that thwarted him are constitutional. But *McDonald* is surely a foothold to victory. In all likelihood, he will get his gun. Ironically, that handgun may not be the panacea he seeks. It will not address the root causes of the drug- and gang-related crime plaguing his neighborhood. Its promise of safety may be illusory, and it may just increase the risks of homicide, suicide, and accidental injury and death of those who live in or, like his grandchildren, visit his home. It may also create legal problems. If he kills a neighborhood thug in self-defense, the odds that he will be held blameless are slim: in every year from 2004 through 2008, less than 2.5% of handgun-related killings by private citizens were deemed justifiable homicides (see table).⁴ McDonald has, however, secured a measure of immortality; he will forever be associated with the case that bears his name.

That case marks another installment in high-minded constitutional debates. But we should not forget that the collateral damage from firearms, especially handguns, is breathtaking. In the face of staggering statistics about eminently avoidable gun-related harms, perhaps the wisest play for this newfound constitutional right is not to use it at all.

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Private-Party Gun Sales, Regulation, and Public Safety

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In 2007, a total of 12,632 people in the United States were murdered with firearms, and it is estimated that another 48,676 were treated in hospitals for gunshot wounds received in assaults. Guns are frequently used to commit crimes in the United States, partly because they are so easy to get. This ease of access, in turn, is partially attributable to the fact that there are two systems of re-

tail gun commerce in this country, one involving licensed gun retailers and the other based on private-party gun sellers, and only the former of these systems is regulated. Some 85% of all guns used in crimes and then recovered by law-enforcement agencies have been sold at least once by private parties.

To buy a gun from a gun dealer or other federally licensed gun

retailer, you must show identification. You must certify on a lengthy form that you are buying the gun for yourself and that you are not a member of any of several classes of people (including felons and persons under felony indictment, fugitives, domestic-violence offenders, controlled-substance addicts, persons "adjudicated as a mental defective," and certain others) who are prohibited from purchasing



Police Handguns Displayed by an Unlicensed Vendor, Milwaukee.

or possessing firearms. A background check will be conducted. In more than 90% of cases, the check is completed within minutes, but if there is uncertainty you may wait up to 3 days to get your gun. The retailer must keep a permanent record of your purchase. If you buy more than one handgun from that retailer within 5 business days, the retailer must report the details of your purchase to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

However, under federal law you can also legally buy as many guns as you want from a private party, and none of those procedural safeguards will apply. Private-party gun sales can be completely anonymous and undocumented. Private sellers are not required to see identification or keep records, and they cannot initiate background checks. A brief negotiation over price, an exchange of cash, gun, and a handshake, and your purchase is complete.

These conditions exist because Congress drew on its constitu-

tional authority to regulate interstate commerce in drafting the Gun Control Act of 1968, the law under which modern gun commerce operates. Those “engaged in the business” of selling guns were required to obtain federal licenses, but private parties who sold guns infrequently were not.

Today, private parties can buy and sell many guns a year while claiming not to be engaged in the business. Perhaps 40% of all gun sales nationwide — roughly 6.6 million transactions in 2008 — are made by private parties. Moreover, private parties can sell handguns to anyone 18 years of age or older; licensed retailers cannot sell handguns to anyone under 21 years of age.

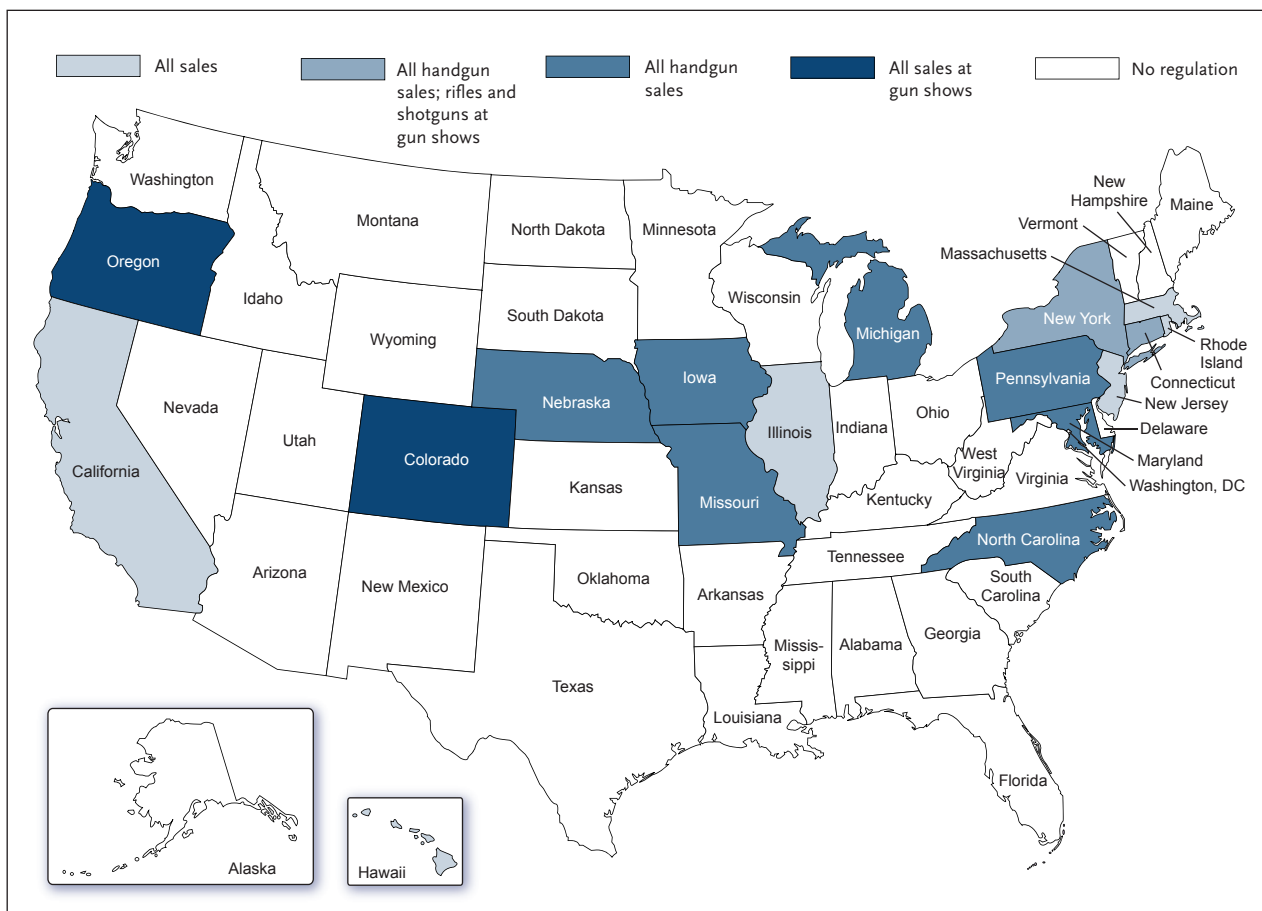
The private-party gun market, sometimes called the informal gun market, has long been recognized as a leading source of guns used in crimes. Although private-party sales are primarily a convenience for the law-abiding purchaser (since they involve no paperwork, no background check, and no waiting period), such sales are also the principal option when the prospective purchaser is a felon, a domestic-violence offender, or another person prohibited by law from owning a gun. Private-party sales facilitate the diversion of guns from legal commerce into criminals’ hands: although it is always illegal for certain classes of people to buy a gun, it is illegal to sell a gun to such people only if the seller knows or has reasonable cause to believe that he or she is doing so. Unscrupulous private sellers may simply avoid asking questions that would lead to such revelations.¹

These two parallel systems of gun commerce are most readily seen in operation at gun shows, where they operate literally side

by side.¹ Large gun shows function as the big-box retailers of gun commerce: hundreds of vendors, both licensed retailers and private parties, display thousands of guns and compete for the business of thousands of potential buyers. It is very likely that most gun sales at gun shows are legal. Nonetheless, these shows have repeatedly been identified as important sources of guns used in crimes.² One ATF investigation of gun-show trafficking involved 10,000 guns that became available for criminal use; another involved 7000.² In this respect, gun shows may be seen as criminogenic pumps, bringing large numbers of buyers seeking guns for criminal purposes together with retailers or private sellers who will ask no questions.

Concerns about private-party gun sales and the importance of gun shows as a source of guns used in crimes have led to repeated calls for closing the “gun show loophole” — by which advocates usually mean requiring that private-party sales at gun shows be routed through a licensed retailer who will do a background check and keep a record of the purchase. President Barack Obama endorsed such a measure during his 2008 presidential campaign, as did President George W. Bush in 2000 and 2004. Legislation to close the loophole has been introduced in both the Senate and the House of Representatives, but no hearings have been scheduled.

In fact, there is no gun-show loophole as such. Federal law is silent on the issue of gun shows and permits private-party gun sales to occur anywhere. As a result, such a limited measure might well have no detectable effect on the rates of firearm-related violent crime. Gun shows



State Procedures for Regulating Private-Party Gun Sales, According to Gun Type and Venue.

States shown in blue require screening of buyers and record keeping according to type of sale. Data are from the *Survey of State Procedures Related to Firearm Sales, 2005*, published by the Bureau of Justice Statistics.

account for a small percentage of all gun sales in the United States — between 4 and 9%, according to the best estimates available.¹ Similarly, they account for just 3 to 8% of all private-party gun sales. Legislation to close the gun-show loophole would not affect the great majority of private-party sales, and motivated illicit buyers could simply find private sellers elsewhere. (In addition, closing the alleged loophole would not necessarily reduce, by more than a small amount, the importance of gun shows as a source of guns used in crimes. Most sales at gun shows — more than 80%, ac-

cording to unpublished data³ — are made by licensed retailers, not private parties, and data from gun-trafficking investigations indicate that two thirds of the guns used in crimes that have been linked to gun shows were sold by licensed retailers.²)

A more effective approach would be to subject all private-party gun sales to the screening and record-keeping requirements that apply to sales by licensed retailers. Six states do so already, and nine others regulate all sales of handguns (see map).

Screening works. In 2008, under the terms of the federal Brady Handgun Violence Prevention Act,

federal and state agencies conducted 9,900,711 checks initiated by licensed retailers and denied 147,080 purchases (1.5%). Long-term observational studies in California show that denial, in turn, is associated with a roughly 25% decrease in the risk that the would-be purchaser will later commit a crime involving guns or violence. Unfortunately, the effect of such regulations when they are implemented at the state level, as they usually are, is blunted by the lack of similar requirements in other states. Similarly, perhaps the principal reason for the well-documented failure of the Brady Act to lower rates of firearm-related

homicide is that its requirements do not apply to private-party gun sales.⁴ Regulating all private-party sales, by contrast, would have measurable benefits.⁵

Private-party gun sales might become more expensive if certifications and background checks were required; in California, retailers may charge a processing fee of up to \$25. They would also become less convenient, but airport security screening offers a useful example here: we might know that security screening is an unnecessary intrusion as applied to us, but we have no such certainty that it is unnecessary as applied to those who are standing in line with us, and few people would endorse a proposal to leave the decision about whether to be screened to the individual passenger.

Drawbacks with respect to ex-

pense and inconvenience notwithstanding, 83% of self-reported gun owners and 87% of the general population endorsed regulation for all private-party gun sales in a 2008 poll that was conducted for the advocacy organization Mayors Against Illegal Guns. Gun owners gave stronger support to this all-inclusive approach than to a gun-show-only proposal in a 2009 poll conducted for the same organization. Either proposal would face tough sledding on Capitol Hill. It would therefore seem preferable to move forward with the version that is most likely to reduce the rates of firearm-related violence.

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